Ambassador Bleich's Remarks To The Sydney Law Council

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Thank you for that kind introduction. I want to thank my old friends and colleagues at the ABA Section of International Law, the Law Council of Australia, the Law Society of New South Wales and the New South Wales Bar Association for inviting me to speak. Thank you also to Freehills for generously hosting this luncheon.

It's been a great honor to welcome you all to Sydney. I understand this is the first ABA International Conference to be held in Australia. I congratulate you all on your choice of venue, but I have to ask, "What took you so long?" This city and this country are terrific. I can't imagine it was a tough sell to trade Snowmaggedon in D.C. for the beautiful sunshine of Sydney. But regardless, I'm glad you made it here. As Justice Felix Frankfurter once said, "Wisdom too often never comes, so one ought not to reject it merely because it comes late." So welcome belatedly to Sydney.

I'm also very glad to have Justice Scalia here. I reminded Justice Scalia last night that I first met him over 20 years ago when he interviewed me for a clerkship on the Supreme Court. I was a 3rd year law student back then, and I was a little intimidated about the interview. So beforehand I called a friend, Harry Litman, who was already clerking on the Court to get his advice. Harry assured me that despite the way Justice Scalia appeared to pick apart lawyers during argument or issue withering critiques of his colleagues' opinions in dissents, I shouldn't worry. Justice Scalia was really just a big teddy-bear of a guy ..... Unless you made a mistake. And then he was a different kind of bear. So Harry warned me that as long as I was 100 percent accurate about every word I said, and I remembered every single thing I'd learned in law school perfectly, then I'd be just fine.

Funny, but this did not do much to help me get over my fear of interviewing with Justice Scalia.

It may also explain why I wasn't introduced as a former Scalia clerk.

But let me get to my topic. In my current incarnation, it's unclear to my old friends from the ABA whether I am still a recovering lawyer or if I'm fully over to being a diplomat. So to prove that I'm neither a recovered lawyer nor an experienced diplomat, I plan to commit heresy against both professions today. First, as a radical departure from most diplomatic speeches, I hope to say something interesting today: namely my take on the

subject of using international law in American courts. And second, I'll offer a bit of heresy as a former State Bar President by suggesting that one way to improve our courts and our profession would be to make it easier for foreign lawyers to participate in our courts.

On the first point, I'd like to take a step back and describe the actual state of U.S. courts and their use of international law. From reading the popular media over the last several years, you might think that United States courts reject the use of international law and that it is generally controversial even to cite to foreign law. This is wrong, but it is based on some high profile events over the last few years which made people' wonder. So I'd like to set the record straight.

There is no doubt that there were some events over the last few years that concerned people who advocate greater U.S. engagement in the international legal community. Some involved the United States expressing reluctance about a number of international agreements. To be specific, the U.S. signed but declined to ratify Kyoto, it unsigned the Rome Treaty establishing an international criminal court, and - after the U.S. lost a case against Mexico in the International Court of Justice that arose under the Vienna Convention case - the U.S. withdrew from the optional protocol by which Vienna Convention disputes would continue to go to the ICJ.

Certain other actions in the war on terror also raised concerns about U.S. commitment to international law. The principal ones were of course the use of the Guantanmo base in Cuba to hold terror suspects indefinitely; and the revelation that the U.S. Justice Department had approved the use of certain enhanced interrogation techniques that most of the humanitarian law experts believed violated international norms.

Finally, there's been this lively debate within the U.S. Supreme Court and among some lower courts and academics, about when and how international law norms should be considered in interpreting federal laws. We heard some of that debate in the discussion between Justice Kirby and Justice Scalia this morning. This whole constellation of events inspired some observers to question whether the U.S. was abandoning its commitment to international law. It also inspired certain members of Congress to fuel the media fire by proposing legislation that would ban virtually any reference to international law or foreign judicial decisions in American courts.

So let me be perfectly clear from the outset. The United States today is committed to its international responsibilities, and it is committed to the Rule of Law. This Administration demands that U.S. agencies honor international law, and the President himself has traveled the globe to assure the world of that commitment. The U.S. has also taken specific actions to advance that goal. It has repudiated the so-called "torture memo" and barred these enhanced interrogation techniques. It has begun the process of closing

Guantanemo. And the Supreme Court established the right of detainees in Guantanamo to certain basic protections.

The U.S. has also aggressively pursued renewed international engagement, including a new climate change accord in Copenhagen, and the Trans-Pacific Partnership that would bind South America, Asia, Australia, and the U.S..

But I also want to be clear that concern about the United States courts ever seriously backing away from their responsibilities to enforce foreign law were always overstated. As lawyers, it's our job to be precise about where the law stands. So let me put it in context. The truth is that U.S. Courts apply, and have always applied, international law in numerous ways every single day without controversy.

The first and most obvious way in which U.S. courts apply international law is by enforcing international agreements, whether those are international treaties or merely commercial agreements or contracts. Justice Scalia made this point this morning. U.S. courts apply and interpret these international laws daily and they've developed expertise in doing this. The fact that the U.S. government will sometimes amend or rescind an agreement may reflect a shift in substantive policy, but it isn't a rejection of international law. It is no different than Congress amending any other law.

The second way in which international law is regularly applied in U.S. Courts is where a U.S. law expressly incorporates international law into its application. For example the Alien Tort Claims Act lets individuals bring actions against persons who violate the law of nations under color of state authority. To determine what the law of nations means is a question of international law, and again, American Courts handle this sort of inquiry all the time, and have developed expertise in international law as a result.

Which brings us to the third and final way in which U.S. Courts may routinely consider international laws or decisions of foreign courts: Courts commonly cite international and foreign law in U.S. courts decisions to help them in interpreting domestic law - whether it is statutory or constitutional. Now if you saw the debate this morning between Justice Kirby and Justice Scalia, you know that this can generate a little controversy among academics and some judges. But my point is not to wade deeply into that thicket. My point is that it happens all of the time and despite the back-and-forth in the Supreme Court on the subject I expect it will continue to be a common practice for three reasons.

First, this practice has long historical roots and it began for a very practical reason. When the United States first started, we had no body of federal law to draw upon. So it was both expected and frankly necessary that U.S. courts would have to look to international laws and analogous court decisions to help figure out how to resolve legal disputes.

Not surprisingly, the U.S. Supreme Court since its inception has been making reference to foreign law. Under the legendary Chief Justice John Marshall, the Court routinely looked to other nations to interpret treaties or settle disputes concerning ships on the high seas. The *Charming Betsy* decision in 1804 is just one example. Justice Scalia mentioned the use of foreign decisions more recently in *Trop v. Dulles*, but one can find references to foreign decisions and laws in constitutional cases throughout the Court's history. In the *Dred Scott* case - the famous slavery case from the mid-1800s -- both the majority and the dissenting opinions referenced foreign law. And since we're all here in Australia (and I used to teach the Commerce Clause), I have to mention Wickard v. Filburn - one of the more famous Supreme Court decisions on the Commerce Clause. There, in 1942, the Court discussed the Australian experience in regulating wheat markets in holding that the U.S. Congress could regulate wheat production for home consumption.

I could cite countless examples but I think you get the point. The Courts have always looked to the laws of other countries, and the practice has not been particularly controversial except in cases involving certain highly sensitive issues.

But the practice I believe will continue not merely because it is embedded in precedent. The second reason it will continue has to do with the nature of judging. When the law isn't clear, judges still have to make a decision and so they tend to look at anything that may give them some insight. American lawyers, recalling their course in evidence, may analogize this to how lawyers are allowed to use basically anything to refresh a witness's recollection. If a witness thinks that waving a bowl of fettucine alfredo under their nose will refresh their recollection, then you can bring fettucine into the courtroom. The fettucine isn't evidence, it is a trigger that moves the thought process forward.

The same is true of many things in judging. Oliver Wendell Holmes did – as Justice Scalia has noted – observe that the common law is not a brooding omnipresence in the sky to be divined by judges, but at the same time he routinely drew from opinions of other Courts including state courts to refine his thinking. I recall when I was clerking that judges cited all sorts of non-binding and non-judicial materials in their opinions that helped them reach a decision. Chief Justice Rehnquist cited the Star Spangled Banner and various folk poems about the flag in his opinion regarding flag burning ("shoot if you must this old grey head, but spare the Country's flag she said"). Chief Justice Burger often cited the bible. Justice Scalia has cited Sherlock Holmes. Nearly all of the Justices have cited law review articles, and empirical studies, and opinions from state courts, not as precedent but as a way of helping to understand the history of a law, its practical effect, and the meaning of its language. So if our judges are trained in this tradition, it would be reasonable to expect that they would ignore insights about a similar legal system that's examining the same issue, while they are quoting poets, and scholars, and

religious texts. So I expect that judges are going to look to any sources that will help them decide.

Finally, the third reason that courts will continue to consider international experience when they are deciding domestic law has to do with our nation's fundamental belief in inalienable rights. Our system is founded on the idea that certain rights exist independent of government. They transcend borders and reflect common principles endowed by our creator. This principle in not merely horatory language – it is reflected in where we invest our money and how we act internationally. The U.S. invests billions annually to spread this message about the rule of law and human rights around the world. We do this because we believe at our core that people do share some common sense of justice. Today, we have diplomats all around the world demanding that other Countries follow basic norms - whether it has to do with protecting cyberspace from corruption, or preserving the environment, or protecting the right to dissent and free speech. So it would be fundamentally inconsistent for us after enlisting all of the apparatus of the U.S. to advance this common set of values, to then turn around and ignore in the law those instances where common values can be discovered. Justice Anthony Kennedy expressed this idea is slightly grander terms. He wrote, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."

This conclusion, that we shouldn't be afraid to discuss international norms, and that indeed they are here to stay, leads me to my second act of heresy. The mere fact that courts will use international norms doesn't end the matter. Justice Scalia's criticism that international law and foreign decisions can be selective, anti-democratic, and misleading is valid, and so we have a duty to make sure that foreign decisions are assessed carefully. The point is that we should not limit the ability of judges to cite foreign decisions; we should improve their ability to evaluate those decisions. This means, and Chief Justice Gleason observed, that we need to train lawyers and jurists to better understand the relevance and weight of foreign laws and decisions.

Unless a judge is very knowledgeable about another legal system, it is hard for him or her to know whether the facts of a foreign case are analogous, the law is analogous, or the systems are analogous enough to draw meaningful conclusions from that decision. How do we know U.S. judges are competent to interpret foreign law, and vice versa? Well, the same way we make sure that judges know the background of any other decision. We depend upon a combination of lawyers who know their stuff, as well as the experience judges to know how to fill in the gaps in their knowledge. As I said, judges already interpret international law and foreign decisions in many other contexts, so this is nothing new.

Our challenge is to do it better. That requires allowing more lawyers and judges with experience in international law to participate in U.S. courts. As the great Oliver Wendell Holmes said "the life of the law is not logic; it has been experience." Any good lawyer or judge will admit that their confidence in a decision depends upon who wrote it, the reputation of the court and the lawyers, and many other things that you pick up in practice. The best way for lawyers in different countries to develop judgment about the value of a decision is through experience. That includes the experience of exchanges that occur at conferences like this one. Through the programs like our International Legal Exchange. And through practicing law in different countries with different systems.

Also, with apologies to my friends at the State Bar, this goal also means easing some unnecessary restrictions on the ability of non-U.S. lawyers to experience U.S. courts. Not that any bar would ever knowingly create artificial barriers to entry or anything . . . .

Since the time of the Australia-U.S. Free Trade Agreement, we have been working on easing restrictions on practice between our two countries. In California, this might include allowing Australian law graduates and lawyers to sit for the California bar even though they have not graduated from a California accredited legal institution. Allowing Australian lawyers to appear in California courts pro hav vice. And to improve access for them to work as foreign legal consultants to advise U.S. clients in foreign and international law in cooperation with local U.S. lawyers. While the goal of the Free Trade Agreement is simply to allow more qualified foreign lawyers to gain practical, nuts and bolts legal experience in the U.S., my point is that it also serves another important goal. It would give other nations valuable exposure to the U.S. legal system in general, and it would give us a better sense of the lawyers, judges, processes, and other influences on foreign decisions.

That's why we've created the Working Group on Professional Services as part of the Australia U.S. Free Trade Agreement. And today, the working group continues its efforts to increase the market access for Australian legal practitioners in the U.S. I'm grateful for the work of my predecessor Ambassador McCallum, and former Law Council President Tim Bugg on this important matter. Because this is not just a way to increase commerce between our nations, it is a way to increase understanding that improves both of our legal systems.

So let me finish with this thought from Justice Sandra Day O'Connor: "no institution of government can afford to ignore the rest of the world." International lawyers and judges and the decisions they produce are part of our jurisprudence. In confronting this reality, I think it is our challenge as lawyers to work together to increase our understanding of the process and one another.